

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

<p>BUSINESS CASUAL HOLDINGS, LLC,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;">v.</p> <p>YOUTUBE, LLC; GOOGLE LLC; <i>and</i> ALPHABET INC.,</p> <p style="text-align: center;"><i>Defendants.</i></p>	<p style="text-align: right;">Docket No.: 21-cv-3610</p>
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REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S
MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

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INTRODUCTION

This lawsuit is not about YouTube’s failure to remove infringing content from its website “promptly.” Nor is it about Business Casual’s (“BC’s”) “misbegotten” claims against YouTube for RT’s exploitation of its “public-domain images.” And it most certainly is not about forcing YouTube to remove RT’s “non-infringing content.” YouTube’s mischaracterizations of BC’s arguments are telling attempts to distract this Court from YouTube’s ongoing *refusal to terminate the channels of an obvious repeat infringer*—one that has already conceded, in writing, to filing “fraudulent DMCA counter-notifications,” in bad faith, for the *admitted purpose* of not being classified as a repeat infringer to avoid the termination of its channels. (¶¶ 1, 114.)

YouTube insists that its DMCA safe harbor eligibility is not at issue. That is nonsense. From day one, YouTube’s safe harbor eligibility has been the *only* issue before this Court. As the proposed FAC makes clear, YouTube is actively harboring (i.e., refusing to terminate) the channels of an admitted repeat infringer with “3 YT strikes” in willful violation of its published three-strike policy. The law presented YouTube with two choices: terminate the accounts of repeat infringers in accordance with its published policy or lose the safe harbor. YouTube chose the latter; that is why we are here.

STATEMENT OF FACTS

1. YouTube's Willful Blindness

There is no genuine dispute that RT's repeated infringements of BC's copyrights (§§ 39-51, 87-88.) are obvious with just a brief and casual viewing (§§ 2, 6.):



YouTube deems allegations of its willful blindness implausible because BC has “conceded” that RT's infringing content was removed from YouTube's website. But that is grossly misleading. YouTube acted with willful blindness, and continues to act with willful blindness, not because it failed to expeditiously remove RT's infringing *content* after receiving BC's takedown notices. That has never been Plaintiff's position. YouTube's willful blindness is its refusal to terminate RT's *accounts* in accordance with its published policy, even after acquiring an email from TV-Novosti's representative conceding the *real* reason it would not retract its strike disputes is

because “withdrawing the counter-notifications will result in YouTube terminating RT’s channel[s]”:

Mr. Duff,

We are in receipt of your emails of April 14 and 16. Our client does not agree to BC’s preconditions, since it our client’s understanding that withdrawing the counter-notifications will result in YouTube terminating RT’s channel. Our client continues, however, to be interested in a pre-litigation resolution. In view of our client’s willingness to discuss settlement, it does not believe service is appropriate at this time.

(¶¶ 4, 110.) YouTube’s actual knowledge of RT’s damning admission is the smoking gun. (¶ 5.) Should this Court hear only one thing, let it be YouTube’s deafening silence concerning the 223 pages of emails between its representatives and BC, as set forth in the proposed FAC, which show how it weaponizes 17 U.S.C. §512(i)(1)(A) (the “DMCA”) against rightsholders. (¶¶ 23, 113.) The FAC contains these key allegations, which are further supported by the record:

- TV-Novosti has repeatedly infringed several of BC’s copyrights. (¶¶ 2, 71-99.)
- YouTube’s policy is to not terminate the channels of a repeat infringer that files DMCA counter-notifications, even if they are obviously false and submitted in bad faith, until all three infringements (which much be within 90 days of one another) are “adjudicated” (¶¶ 13, 19, 71-75.)
- TV-Novosti is a repeat infringer with “3 YT strikes.” (¶¶ 13, 102, 111, 147.)
- TV-Novosti knowingly filed materially false DMCA counter-notifications for the admitted purpose of avoiding the “termination” of its channels. (¶ 149.)
- YouTube possesses actual and red-flag knowledge of each of the foregoing facts. (¶¶ 13, 15, 110-117, 124-140.)
- YouTube still refuses to terminate TV-Novosti’s channels. (¶¶ 139-154.)

2. YouTube’s “Anti-Infringement Technology”

The Court’s March 21, 2022 Memorandum and Opinion (“Opinion”) notes that “YouTube actively and diligently policed allegedly infringing activity on its platform . . .” and acknowledges that BC has never alleged that YouTube lacks anti-infringement technology. As the FAC makes clear, YouTube acquired actual knowledge of RT’s many years of circumventing its systems to infringe BC’s copyrights (§§ 13, 15, 110-117, 124-140, 176) but it still refuses terminate RT’s channels or disgorge any revenues that it collected as a result of RT’s pirated content. Moreover, as set forth in a Declaration¹ from Plaintiff’s principal in support of the FAC (§§ 63 – 70), YouTube *knowingly facilitates* copyright infringement by providing TV-Novosti and others with access to its covertly-deployed Managed CMS technology, which is specifically designed to help select channels evade detection from rightsholders who rely on YouTube’s Content ID to automatically detect copies of their works. (§§ 63-70; Edson Declaration.)

3. The “Suspension” of RT’s Channels

Contrary to YouTube’s representations in this litigation, RT’s channels are not “suspended.” While the public’s access to RT’s *videos* are temporarily “blocked worldwide” (for reasons unrelated to this lawsuit), RT can login to its channels right now and view all its videos. In fact, YouTube has indicated that it may lift the block currently in effect on RT’s videos after the conclusion of the conflict in Ukraine. But both 17 U.S.C. §512(i)(1)(A) and YouTube’s

¹ While YouTube’s asserted factual rebuttals to the allegations of the FAC via memorandum of law are improper, there are situations when a Court may go beyond the four corners of the pleadings to assess plausibility. *See, Sahu v. Union Carbide Corp.*, 548 F.3d 59, 68 (2d Cir. 2008). An accusation that a party stands to violate Rule 11 should be one of them.

published policy prescribe **termination** of repeat infringers, not mere “suspension.” The difference is that termination is permanent. YouTube is also asking this Court to ignore the 346-day period from March 31, 2021 through March 11, 2022, during which YouTube turned a blind eye to RT’s admittedly false counter-notifications and knowingly enabled RT’s 39 channels to successfully skirt termination. This nearly year-long refusal by YouTube to comply with the DMCA generated an estimated \$14 million dollars in AdSense profits for YouTube and RT respectively. (¶ 22.) Plaintiff seeks the disgorgement of Defendant’s ill-gotten gains, and has alleged plausible facts in the FAC which, if proved, entitle it to recover these funds. (¶ 24.)

4. An Unpublished Policy is an Unreasonable Policy

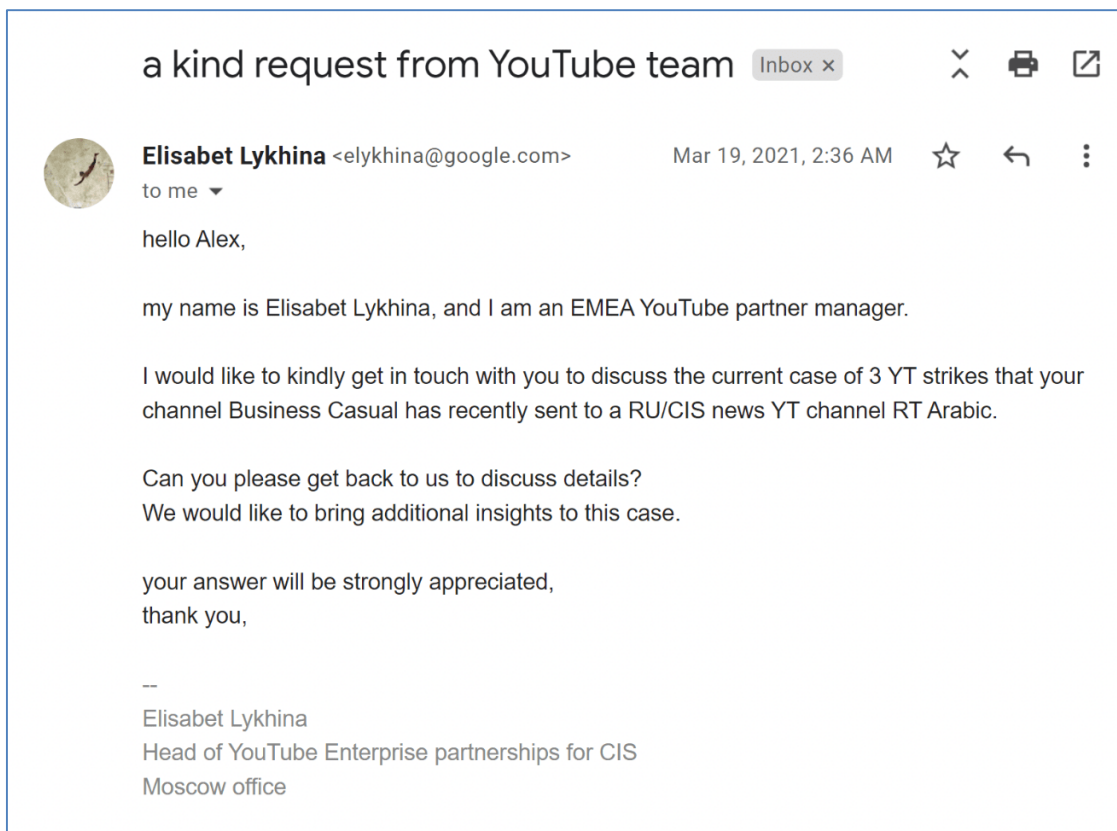
YouTube claims that Business Casual’s factual allegation that its Content Manager policy is “special,” “off-the-books,” and “secret” is false “and would run afoul of Rule 11 if included in a signed and filed pleading.” (Opp. at 5-6, n. 3.)² Tellingly, YouTube does not even try to explain how a **YouTube user** unfamiliar with the opaque term “Content Manager” can find its hidden webpage, which is buried under a sea of other articles on **Google’s** “Help Forum.” In fact, YouTube’s special repeat infringer policy for “Content Managers” cannot be found anywhere at YouTube.com. (¶ 67.) How can YouTube’s users ever be expected to be informed about a policy that is not even published on YouTube’s website?

LEGAL ARGUMENT

I. THE ALLEGATIONS AND THE RECORD ESTABLISH A PLAUSIBLE PRESUMPTION THAT YOUTUBE ACTED IN CONCERT WITH RT.

A defendant is liable for contributory infringement when it intentionally induces or encourages direct infringement. *Metro-Goldwyn Mayer Studios Inc. v. Grokster*, 545 U.S. 913, 930 (2005). In its Opinion, this Court concluded that “BC has not alleged plausibly that YouTube ‘acted in concert’ with TV-Novosti or participated in or contributed to the alleged infringement in any way.” The additional allegations, supported by ample documentation in the proposed FAC, readily meet the standard of plausibility. As does the record in this matter. YouTube consistently asserts that its legal duty is not to determine whether an alleged infringement constitutes fair use, but only to expeditiously remove content that is *claimed* to be infringing after receiving a takedown notice. (¶ 122.) And yet, throughout the proceedings, YouTube has repeatedly advocated for TV-Novosti’s “very strong fair use defense.”³ On a related note, if YouTube “cannot act as a mediator” in copyright disputes between creators—as it claims—why did Google Moscow’s Head of

³ Defendant has stated, “Only a few seconds-worth from three of TVN’s thousands of videos are in dispute, and those momentary segments consist entirely of public-domain images” (ECF 25); “Plaintiff’s only claimed originality consists of certain ‘video editing methods’ that it used to display the images with a ‘3-D depth of field’” (*id.*); “[TV-Novosti] have a very strong copyright-ability defense. They also very likely have a very strong fair use defense” (Conf. call with Judge Ramos); “Fair Use is important here, because not only was the content so *de minimus*, 10 seconds, but the content at issue is really historical public domain images. The only ‘originality’ that they claim is the way that those images were displayed” (*id.*).



Enterprise Partnerships interject herself as a copyright mediator between BC and TV-Novosti in an effort to “bring new insights” to Plaintiff’s case against TV-Novosti? (¶¶ 147, 152-153.)

A. All Channels are Equal, but some are More Equal than Others

Obviously if there is no prima facie infringement claim, there can be no secondary infringement claim. But YouTube’s “no harm, no foul” argument signals something else entirely. By advocating for its 35-strike “Content Manager” policy, YouTube is conceding a key fact: *YouTube does not equally implement its repeat infringer policy*. A policy that provides for two sets of rules, one of which is hosted on a secret web-page and provides YouTube’s most profitable repeat infringers with the greatest toleration for copyright infringement, is no “policy” at all. The DMCA makes no allowance for such favoritism, for a “repeat infringer . . . is one who infringes a copyright *more than once*.” *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 301 (4th Cir. 2018) (emphasis added). At least in *Cox*, the defendant applied the same non-compliant

policy (13 strikes every 6 months) to all its account holders. YouTube cannot say the same. Under YouTube’s policy for creators such as BC and the 40 million other peasants on its site, Plaintiff’s account can receive up to eight uncontested copyright strikes every 12 months without ever facing termination. (¶ 58.) *Under YouTube’s policy for “Content Owners,” TV-Novosti can receive up to 35 uncontested copyright strikes, every 12 months, without ever facing termination.* (¶ 65.) And under both policies, a willful, admitted, and obvious repeat infringer does not even to dispute its copyright strikes. It can simply wait for them to expire before going on another infringing spree, repeating this process indefinitely. (¶ 60.)

A policy that does not provide for the termination of account holders who repeatedly infringe the copyrights of others is inappropriate, unreasonably implemented, and should result in YouTube losing its safe harbor protection.

B. YouTube’s Adjudication Mandate is Unlawful.

Contrary to YouTube’s rhetoric, it is not Plaintiff’s position that a user’s channel should be terminated merely because someone says it is a repeat infringer. Plaintiff has invested many thousands of hours into building its own popular channel and would be heartbroken if its account were shut down because a bad actor filed fraudulent takedown notices against it. What Plaintiff *actually* argues is that the DMCA requires YouTube to apply its repeat infringer policy equally, and, in rare cases such as this one—where the repeat infringement is obvious and the counter-notifications are admittedly fraudulent—step-in and terminate the repeat infringer. (¶¶ 20-21.)

C. YouTube’s “Non-Infringing” Argument

YouTube’s argument that terminating TV-Novosti’s entire account is somehow at odds with the DMCA because this would mean having to remove “non-infringing content which has

nothing to do with this case” completely misses the point of the DMCA. When Congress enacted the statute in 1998, it was acutely aware that the termination of a repeat infringer’s account would entail the removal of both infringing *and non-infringing* material. In fact, it is *because* of this — not in spite of it—that the word “termination” was specifically chosen by Congress. Lawmakers knew that merely taking-down a pirate’s infringing material would be like playing a game of whack-a-mole.

The legislative history of the repeat infringer provision supports this conclusion. Both the House Commerce and Senate Judiciary Committee Reports explained that **“those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.”** H.R. Rep. No. 105-551, pt. 2, at 61 (1998); S. Rep. No. 105-190, at 52 (1998). This passage makes clear that if persons “abuse their access to the Internet through disrespect for the intellectual property rights of others”—that is, if they infringe copyrights—they should face a “realistic threat of losing” their Internet access. **The passage does not suggest that they should risk losing Internet access only once they have been sued in court and found liable for multiple instances of infringement.** Indeed, the risk of losing one’s Internet access would hardly constitute a “realistic threat” capable of deterring infringement if that punishment applied only to those already subject to civil penalties and legal fees as adjudicated infringers.

Cox, 881 F.3d at 302 (emphasis added). Just as in *Cox*, YouTube cannot point to a single case supporting its position that repeat infringers must be “adjudicated” before being terminated. That’s because the DMCA mandates termination of repeat infringers in *appropriate circumstances*, i.e., when the facts establish the existence on the platform of “one who infringes a copyright more than

once.” *Id.* at 301.⁴ BC is not asking YouTube to do anything more than what its own policy requires under the circumstances.

What action does YouTube take for copyright infringement?

If a copyright owner submits a valid DMCA complaint through our webform, we take down that video and apply a **copyright strike**. If a user gets three copyright strikes in 90 days, their account, along with any associated channels, will be terminated. We also have tools to help Creators resolve their copyright strikes - including waiting for it to expire after 90 days, requesting a retraction, or submitting a counter notification.

D. TV-Novosti, Not RT Arabic, is the Repeat Infringer

In a conference call with Judge Ramos, YouTube explicitly stated that all 39 of RT’s channels are “associated” and conceded the “alleged” repeat infringer in this case was not RT Arabic but TV-Novosti. YouTube also explicitly stated the reason why “YouTube did not terminate TVN’s entire account, which includes dozens of separate channels (in addition to RT Arabic) [...]” is because “TVN denied Plaintiff’s accusations and submitted counter-notifications disputing them [...] YouTube thus informed Plaintiff that “[i]f a court resolves the copyright claims

⁴ “If a user gets three copyright strikes in 90 days, their account, **along with any associated channels**, will be **terminated**.” (Emphasis added). (URL: <https://www.youtube.com/howyoutubeworks/policies/copyright/#enforcing-copyright>)

you’ve brought against [RT Arabic] in your favor,’ Plaintiff can submit that judgment to YouTube [...].” (ECF 25.) YouTube made this statement over a year ago. The only reason Defendant provided for its refusal to terminate TV-Novosti’s dozens of channels was the pendency of BC’s separate case against TV-Novosti. With entry of a default judgment in that case now imminent, YouTube is reneging on its prior commitment to terminate the 38 other channels associated with RT Arabic following the adjudication of TV-Novosti as a repeat infringer. YouTube’s original position in this case was the correct one: TV-Novosti is the repeat infringer and all 38 of RT Arabic’s associated channels are subject to termination.

II. THE YOUTUBE LICENSE DOES NOT EXEMPT YOUTUBE FROM SECONDARY LIABILITY FOR A THIRD PARTY’S INFRINGEMENT CAUSED, INDUCED OR IGNORED BY YOUTUBE.

Defendant relies on the License, as set forth in the Opinion, as carte blanche to profit however it so desires from Plaintiff’s content. But “[a]n unauthorized licensor may be liable for infringement committed by his unauthorized licensees under a theory of contributory infringement as ‘one who with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct.’” *Davis v. Blige*, 505 F.3d 90, 105 n.13 (2d Cir. 2007). Thus “under appropriate circumstances, a licensor will be liable as a contributory infringer where his licensee pursuant to such license infringes a copyright of a third party by making unauthorized copies or unauthorized performances.” 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 12.04[A][3][a] (2010), quoted in *Crispin v. Christian Audigier, Inc.*, No. CV099509ABCJEMX, 2010 WL 11508342, at *5 (C.D. Cal. June 21, 2010).

TV-Novosti is not a licensee. Nor can YouTube license Plaintiff’s works to an infringer after the infringement has occurred. *Davis*, 505 F.3d at 106. Even if it could, moreover, a dismissal on the basis of a sublicense running from YouTube to TV-Novosti would not be an appropriate

basis for dismissal at the pleadings stage. The FAC sets out new and detailed allegations concerning the extent, degree and type of cooperation and joint conduct—the sort of “appropriate circumstances” referred to by Nimmer above. See, *Seals v. Compendia Media Grp.*, 290 F. Supp. 2d 947, 953 (N.D. Ill. 2003) (licensees profited unlawfully from unlicensed third party’s infringements). The FAC alleges facts plausibly showing collusion between Defendant and TV-Novosti and easily meet the low threshold to state a claim for contributory copyright infringement, and indeed, possibly direct infringement. See, *Roberts v. BroadwayHD LLC*, No. 19 CIV. 9200 (KPF), 2022 WL 976872, at *13 (S.D.N.Y. Mar. 31, 2022) (construing allegations in the light most favorable to plaintiff, claim that defendants found value in and benefited from third party’s alleged infringement sufficiently stated a claim for contributory infringement).

CONCLUSION

This lawsuit could have been avoided had Defendant done just one thing: apply its DMCA-prescribed repeat infringer policy equally. Rather than do that, YouTube believes a better use of this Court’s time is to analyze the merits of a meritless fair use defense submitted by an obvious pirate; a pirate that has not only has explicitly admitted to disputing its copyright strikes in bad-faith to avoid being classified as a repeat infringer, but one that is funded by the Kremlin so that it can continue weaponize YouTube’s platform to carry on with fulfilling its self-described mission—“to be an information weapon to be used against the United States of America.”

If this lawsuit is dismissed, what message will this Court be sending to the hundreds of thousands of pirates actively watching this case? How long before these pirates start citing *Business Casual Holdings v. YouTube et al* in their meritless counter-notifications to avoid the termination of their accounts? For these reasons, leave to amend the Complaint should be granted.

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CERTIFICATION OF COMPLIANCE

The undersigned counsel for Plaintiff certifies that this Reply Memorandum of Law contains 2,703 words pursuant to the calculation set forth in the Court's Individual Rules, Section II(D), and complies with all the formatting rules set forth in that Section.

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